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Short-lived Reparliamentarisation? A Year of Efforts to 'Take Back Control' from the Executive in the Brexit House of Commons

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1. Introduction

The Leave campaign in the United Kingdom (UK)'s June 2016 referendum on European Union (EU) membership famously exhorted the UK – notionally through its Parliament - to 'take back control' from the EU. Subsequently the slogan was invoked by Members of Parliament (MPs) in their efforts to scrutinise the UK Government's Brexit strategy in the House of Commons.[1]

To focus the scope, this chapter adopts as its timeframe the period from the introduction of the draft Withdrawal Agreement and Political Declaration on the Future Relationship[2] in December 2018 to the dissolution of Parliament in November 2019 prior to the UK General Election a month later. While the House of Lords has also played a significant constitutional and practical role in checking the executive in the context of Brexit,[3] this chapter concentrates on the role of MPs, particularly backbenchers,[4] in the House of Commons.

Echoing the themes of this volume, deparliamentarisation holds that governments are better placed to be active players in EU decision-making, and that legislatures may have insufficient control of the actions of the executive. In the EU literature, reparliamentarisation refers to post-Lisbon Treaty rights and opportunities for national parliaments in EU politics, including

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[1] For example, see the debates on 1 April 2019 regarding taking control of the Parliamentary agenda to hold the second round of indicative votes: HC Deb 1 April 2019, vol 657, cols 804, 807, particularly the interventions of Pete Wishart (Scottish National Party), Angela Eagle (Labour), and Edward Leigh (Conservative)

[2] <https://www.gov.uk/government/publications/withdrawal-agreement-and-political-declaration>

[3] J Smith 'Fighting to 'Take Back Control': The House of Lords and Brexit' in T Christiansen & D Fromage (eds) T Christiansen and D Fromage (eds) *Brexit and Democracy: the role of Parliaments in the UK and the EU* (Palgrave Macmillan, 2019) 81-103

[4] In the UK 'backbencher' refers to an MP who is not a member of government nor the shadow cabinet of the main opposition party.

channels for interparliamentary coordination.[5] This invites consideration of reparliamentarisation in a new, post-EU membership, context where competences are downloaded from the EU to the national level. Specifically in the UK, it is not yet clear what effect this repatriation will have on the overall balance of powers, nor on the devolved administrations in Scotland, Wales and Northern Ireland. In the meantime, the interplay between executive and legislature has come into sharp relief during the withdrawal process itself.

The UK's unwritten constitution rests upon the doctrine of Parliamentary sovereignty. The central tenet of this is that Parliament can make or unmake any law.[6] Ultimately it has the power to remove the Government from office via a no confidence vote. On the face of it, this puts Parliament in a strong, indeed preeminent, position. However, the royal prerogative (exercised by Ministers as the representative of the Crown in Parliament) and constitutional conventions on the role of Government in Parliament restrict this sovereignty. In the context of Brexit, the longstanding debate on conceptions of the role of Government was reignited by suggestions that the Government could veto legislation it did not support (for example, legislation preventing the UK from leaving the EU without an agreement) by advising the Queen to withhold Royal Assent, or, as eventually happened in September 2019, to 'prorogue' Parliament (i.e. end the Parliamentary session).[7]

This contribution focuses on three limitations to Parliamentary power in the Brexit context, alongside the ultimate limitation of prorogation. Rather than analysing legislative amendments to Government Bills,[8] it assesses the use and effectiveness of other

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[5] See e.g. J Pollak and P Slominski 'EU Parliaments after the Treaty of Lisbon: towards a parliamentary field' in B Crum and JE Fossum (eds*) Practices of Inter-Parliamentary Coordination in International Politics: The European Union and Beyond* (ECPR Press, 2014) 144-145

[6] AV Dicey *An Introduction to the Study of the Law of the Constitution* (1885)

[7] For a flavour of the debate on 'representative government' and 'responsible government', see e.g. R Craig 'Executive Versus Legislature in the UK – A Response to Mark Elliott and Tom Poole' (*UK Constitutional Law Association blog,* 5 April 2019) <https://ukconstitutionallaw.org/2019/04/05/robert-craig-executive-versus-legislature-in-the-uk-a-response-to-mark-elliott-and-tom-poole/> ; M Elliott 'Brexit, the Executive and Parliament: A response to John Finnis' (*Public Law for Everyone blog*, 2 April 2019)<https://publiclawforeveryone.com/2019/04/02/brexit-the-executive-and-parliament-a-response-to-john-finnis/ >; S Fowles 'Can the Prime Minister Prorogue Parliament to Deliver a No Deal Brexit?' *UK Constitutional Association Law blog*, 10 June 2019 <https://ukconstitutionallaw.org/2019/06/10/sam-fowles-can-the-prime-minister-prorogue-parliament-to-deliver-a-no-deal-brexit/>

[8] see e.g. M Russell, D Gover, K Wollter 'Does the Executive Dominate the Westminster Legislative Process? Six Reasons for Doubt' (2016) 69(2) *Parliamentary Affairs* 286–308; Legislation at Westminster: Parliamentary Actors and Influence in the Making of British Law (OUP 2017); L Thompson and B Yong 'What Do We Mean by Parliamentary Scrutiny of Brexit? A View from the House of Commons' and P Lynch, R Whitaker and A Cygan 'Brexit and the UK Parliament: Challenges and Opportunities' in Christiansen & Fromage (eds) T Christiansen and D Fromage (eds) *Brexit and Democracy: the role of Parliaments in the UK and the EU* (Palgrave Macmillan,

Parliamentary mechanisms by MPs to scrutinise, curtail and try to steer the UK Government's Brexit agenda in response to these restrictions. Notably, these mechanisms were employed across traditional party-political lines.

The first limitation is the executive's prerogative power, particularly over Treaties and international relations. This is discussed in relation to arguments over when (extensions to the Article 50(3) TEU negotiating period), how (options for the future relationship with the EU) and indeed whether (triggering/revoking Article 50 TEU) Brexit should happen. Cross-party private members' bills by MPs who are not members of the Government, leading to the EU (Withdrawal) Act 2019, challenged the Government's power in this area. Second is agenda-setting and the control of the Parliamentary timetable. Under the standing orders of the House of Commons, Government business takes precedence. Nonetheless, MPs attempted to wrest control of the agenda, for example to hold indicative votes to find out which Brexit options might command majority support, or through amendments to Government motions. The Speaker of the House of Commons played a decisive role in these efforts, as he determines which motions and amendments are selected for debate. The third limitation is the extension of Ministers' power to make secondary legislation under the EU (Withdrawal) Act 2018. Parliament has countered these powers through new statutory instrument scrutiny committees. Other important mechanisms, not considered in detail here, are Backbench Business Committee debates[9] (such as the customs union debate in April 2018), humble addresses[10] (used to access the Government's impact assessments and legal advice to Cabinet), and urgent questions to Ministers.[11]

2019) 29-49, 51-79 on the EU (Notification of Withdrawal) Bill 2017 and the EU (Withdrawal) Bill 2018 respectively

[9] The Backbench Business Committee has a limited number of days when it can schedule any subject for debate, outside the Government's control. MPs make an application for a topic to be considered. The Committee selects subjects based on topicality and timing, the importance of holding a debate, the number of MPs who are likely to take part, and whether a debate has already happened or is likely to be arranged through other means.

[10] A humble address is technically a message to the Queen from either House of Parliament. It can be used to call on a Secretary of State (who is a representative of the Crown in Parliament) to release government papers. As with other motions (proposals), it can be debated, amended and voted on. If agreed, humble addresses are understood to be binding on the House.

[11] Where an urgent issue arises, an MP can apply to the Speaker of the House of Commons to ask a question of a Government Minister that same day. The request is granted if the Speaker is satisfied that the question is urgent and of public importance. A Minister must attend the House of Commons Chamber to explain in person how the Government is responding to the issue.

This contribution finds that through creative use of Parliamentary procedures, Commons backbenchers were successful in steering Brexit strategy to some extent. It is not clear whether this impact on executive-legislative balance will pertain beyond the extraordinary circumstances of Brexit. First, procedures themselves have not formally changed. Secondly, the results of mobilising those procedures were decisive. Finally, the results of the December 2019 General Election suggest that, in the UK, indications of reparliamentarisation were simply a function of the Government lacking a majority. It does seem clear that the party-political system has suffered, and that public trust in Westminster politics has been damaged. Paradoxically, the prospect of withdrawal from the EU increased the salience of EU affairs. Some MPs' motivations were caught between vote-seeking behaviour and making a policy impact, depending on how their own constituencies voted in the 2016 referendum and in local and European Parliament elections since then. Meanwhile, there was greater public awareness of issues surrounding the UK's relationship with the EU as a result of Brexit, but also a sense of 'Groundhog Day' fatigue as a resolution seemed elusive prior to the December 2019 General Election.

In the longer perspective of executive-legislative relations in the ten years since the Lisbon Treaty, the House of Commons had greater access to information which to an extent has allowed it to redress the balance vis-à-vis the executive. It did this by both mainstreaming[12] and streamlining scrutiny of EU affairs. In terms of streamlining, the European Scrutiny Committee (ESC) had a central role in sifting the 1100 EU documents Parliament received each year, prioritising which of those should be subject to full scrutiny and subsidiarity checks. Meanwhile, scrutiny was mainstreamed through Commons select committees responsible for different policy areas. In some instances, the ESC did this, drawing a particular document to the attention of the relevant select committee. On other occasions, EU law and policy came within the remit of a select committee's inquiry into a particular topic, aided by the increased institutional capacity of policy specialists within select committees. These committees also publicly hold Government Ministers to account through evidence sessions. A 2013 ESC report[13] called for rapporteurs to lead on EU issues within committees,

[12] K Gattermann, A-L Högenauer and A Huff 'National Parliaments After Lisbon: Towards Mainstreaming of EU Affairs?' (*OPAL online paper series*, 2013) <http://www.opal-europe.org/tmp/Opal%20Online%20Paper/13.pdf>

[13] European Scrutiny Committee *Reforming the European Scrutiny System in the House of Commons* (HC 2013-14, 109-I)

and a more coordinated approach to the European Commission's Work Programme to allow the House of Commons to engage more effectively and directly with the EU institutions at an earlier stage in the EU legislative process. Scrutiny mechanisms for the future are yet to be decided but may continue from arrangements during the transition period. Where the ESC reports that new EU legislation raises a matter of 'vital national interest' and has consulted the relevant departmental select committee, a Commons debate must be held within 14 days.[14]

The rest of the chapter proceeds as follows. The next section sets out the relevance of the theoretical debate on deparliamentarisation/reparliamentarisation to the UK context. The third section briefly sets out the UK Parliament's role in Brexit, particularly the attempts to pass the draft Withdrawal Agreement and Political Declaration with the EU and the unlawful prorogation. the fourth section examines the three limitations to Parliamentary power identified above which shift the balance in favour of the executive, and the creative use of Parliamentary mechanisms used in response. The final section concludes.

2. From passive to active legislature?

The UK's unwritten constitution rests upon the doctrine of Parliamentary sovereignty. This theoretically means that Parliament can make or unmake any law.[15] However, since Government, representing the Crown, sits in Parliament, a series of constitutional conventions limit its power versus the executive.

Parliament's ultimate power is to remove the government from office via a no confidence vote.[16] Despite this foundation of Parliamentary sovereignty, and the blunt sanction of the confidence motion, the UK's model of Parliamentary powers has traditionally been viewed as comparatively weak.[17] The majority of legislation passed is at the initiative of the Government, which gives the impression that Parliament is largely passive.

[14] s. 29 EU (Withdrawal Agreement) Act 2020

[15] AV Dicey *An Introduction to the Study of the Law of the Constitution* (1885)

[16] Theresa May has successfully weathered two no confidence motions over Brexit: an internal one as leader of the Conservative Party in December 2018, and as the leader of Government in the face of a Labour motion on 16 January 2019 immediately after the Withdrawal Agreement was rejected for the first time.

[17] P Norton 'Parliaments: A framework for analysis' (1990) 13(3) *West European Politics* 1-9; A Lijpart *Patterns of Democracy: Government Forms and Performance in Thirty Six Countries* (Yale University Press, 1999). More recent comparative research on the strength of national parliaments in the EU places the UK somewhere in

However, nuancing the typology of legislatures as having strong or modest policy-making powers,[18] a distinction can be drawn between Parliament formulating and substituting a policy of its own - i.e. policy-making - and policy-influencing. [19] In Mezey's original formulation, 'strong' policy-making power only goes as far as the capability to modify and reject proposals (whereas 'modest' denotes capacity to modify but not veto). Of the Parliamentary mechanisms discussed in this chapter, private members' bills by MPs who are not members of the Government, and, to an extent, MPs' amendments to Government proposals, do represent opportunities for making policy. Indicative votes and scrutiny of secondary legislation are not able to substitute policy, but can influence and reframe its direction.

Another important factor is revealed in Russell's recent research, which further counters the traditional view that the UK Parliament is a weak policy actor relative to the executive. Investigating amendments to Government Bills, she finds that non-government influence and cross-party working is more extensive than previously assumed.[20] This cross-party element is a central feature in the mechanisms discussed below.

In the Brexit Parliament (2017-2019; the longest parliamentary session since the English civil war), two central mechanisms for controlling the House of Commons were absent: the Government had no majority, and party discipline was lacking, meaning that neither the Conservatives nor Labour could rely on their backbenchers to support their respective positions. This situation gave rise to opportunities for Parliament to become more active.

Across the EU, Union membership has been a factor in deparliamentarisation: competences and policy areas which previously belonged to the jurisdiction of national legislatures were transferred upwards to the EU level. This was a double delegation - first upwards to the EU level and then to technocratic and non-majoritarian institutions such as EU agencies and regulatory networks comprised of national regulators.[21] Various elements of the executive

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the middle: see the discussion in K Auel and T Christiansen (2015) 'After Lisbon: National Parliaments in the European Union' (2015) 38(2) *West European Politics* 261-281, 268

[18] M Mezey *Comparative Legislatures* (Duke University Press, 1979)

[19] P Norton 'Parliaments: A framework for analysis' (1990) 13(3) *West European Politics* 1-9, 5

[20] M Russell and D Gover *Legislation at Westminster: Parliamentary Actors and Influence in the Making of British Law* (OUP, 2017); M Russell, D Gover, K Wollter, and M Benton 'Actors, Motivations and Outcomes in the Legislative Process: Policy Influence at Westminster' (2017) 52(1) *Government and Opposition* 1-27; M Russell and P Cowley 'Modes of UK Executive-Legislative Relations Revisited', (2018) 89 (1) *Political Quarterly* 18-28

[21] D Coen and M Thatcher 'Network Governance and Multi-level Delegation: European Networks of Regulatory Agencies' (2008) 28(1) Journal of Public Policy 49-71; T Raunio & S Hix, 'Backbenchers learn to fight back:

were therefore better placed to be active players in EU decision-making, and there were more limited opportunities for Parliaments to control them. However, as Raunio & Hix argue, in the UK example "[w]hile the executive branch - the Prime Minister, individual cabinet ministers, regulatory agencies, and bureaucrats - has strengthened its leverage in agenda-setting, policy preparation and implementation, parliament [including opposition parties and backbenchers] have also improved their position through more effective overall scrutiny of government, particularly better access to information"[22] – such as through the European Scrutiny Committee.

The withdrawal of a Member State implies that those competences and powers are shifted (back) from the EU to the national level. These may include competences which were previously delegated upwards and are now to be 'repatriated', as well as new competences created at the EU level which are to be transferred. In the domestic setting the executive apparently gains from these repatriated or transferred competences. In preparation for EU withdrawal, the executive capitalised on this by expanding the power of Ministers to make secondary legislation to 'correct deficiencies', as discussed in section 4C below. In dealing with EU level functions after exit, the UK government may assume the function on the national level (either on behalf of the UK or through the devolved nations); continue to co-ordinate with the EU in the administration of the function, or remove the function altogether.[23] These gains could be moderated, however. Externally, the government itself will no longer be an active player in EU decision-making, relegated to non-member rule-taker status.[24] Furthermore, it is more likely that the Government will have to delegate some competences to technocratic agencies, particularly as regulatory equivalence in a range of policy areas will need to be monitored in the future UK-EU relationship. This makes it all the more important to disaggregate the study of the executive.

European integration and parliamentary government', (2000) 23(4) *West European Politics* 142-168, 146-7; J Pollak and P Slominski 'EU Parliaments after the Treaty of Lisbon: towards a parliamentary field' in B Crum and JE Fossum (eds*) Practices of Inter-Parliamentary Coordination in International Politics: The European Union and Beyond* (ECPR Press, 2014)

[22] T Raunio & S Hix, 'Backbenchers learn to fight back: European integration and parliamentary government', (2000) 23(4) *West European Politics* 142-168, 144

[23] A Sinclair and J Tomlinson 'Deleting the Administrative State?' (*UK Constitutional Law Association blog*, 7 February 2019) <https://ukconstitutionallaw.org/2019/02/07/alexandra-sinclair-and-joe-tomlinson-deleting-the-administrative-state/>

[24] See e.g. S Lavenex 'The Power of Functionalist Extension: How EU Rules Travel' (2014) 21(6) *Journal of European Public Policy* 885-903

At least two implications of the deparliamentarisation thesis are therefore particularly important in the context of EU withdrawal: the impact of repatriated/transferred competences on executive-legislative relations, and the necessary revision of scrutiny processes. The latter would require continued monitoring of new EU legislation, scrutiny of the UK-EU future relationship, and a new framework for interparliamentary relations. In the existing literature, reparliamentarisation denotes the empowerment of national parliaments in the sphere of EU politics.[25] In a post-EU membership context, this gives rise to questions about whether Parliament can capitalise on competences returning to the national level.

3. Fourth Time Lucky: the 'Meaningful Votes'

The EU (Withdrawal) Bill 2017[26] originally did not contain any provision for Parliament to have a say, much less a veto, on the outcome of the withdrawal negotiations with the EU. Many amendments were tabled as the Bill progressed through Parliament, but the only one that gained traction became section 13 on the 'meaningful vote'.[27] In particular, section 13(7) of the EU (Withdrawal) Act 2018 required the Prime Minister to notify Parliament by 21 January 2019 if no deal could be reached on the substance of the withdrawal agreement and the future relationship. Under 13(8), a Minister then had to make a statement on how the Government proposed to proceed within 14 days, and table a motion to allow Parliament to consider the matter. In the absence of this section, the Withdrawal Agreement and Political Declaration on the Future Relationship would have been more simply ratified through the Constitutional Reform and Governance Act 2010 in the same way as other Treaties.

The timeframe of this chapter begins with a five-day debate on the negotiated Withdrawal Agreement began on 5 December 2018, during which the Government was in a weakened position. In particular, during that week the Government was found in contempt of Parliament for the first time in history for its failure to reveal legal advice to Cabinet on the

[25] See e.g. J Pollak and P Slominski 'EU Parliaments after the Treaty of Lisbon: towards a parliamentary field' in B Crum and JE Fossum (eds*) Practices of Inter-Parliamentary Coordination in International Politics: The European Union and Beyond* (ECPR Press, 2014) 144-145

[26] EU (Withdrawal) HC Bill (2017-19) [5]

[27] J Simson Caird 'Parliament's right to a meaningful vote: Amendments to the EU (Withdrawal) Bill' (*House of Commons Library blog,* 11 June 2018) <https://commonslibrary.parliament.uk/brexit/legislation/parliaments-right-to-a-meaningful-vote-amendments-to-the-eu-withdrawal-bill/>; J Simson Caird 'Not the Meaningful Vote: a Guide to the Role of the Commons on Tuesday' (*Verfassungsblog*, 28 January 2019)<https://verfassungsblog.de/not-the-meaningful-vote-a-guide-to-the-role-of-the-commons-on-tuesday/>

Withdrawal Agreement and Political Declaration on the Future Relationship.[28] In addition an amendment was introduced meaning that Parliament would be able to instruct the Government on particular options - 'Plan B' - under s.13 of the EU (Withdrawal) Act 2018 if the Withdrawal Agreement was not passed.[29] The 'meaningful vote' originally planned for 11 December 2018 was controversially withdrawn the day before when it became clear the Government did not have the necessary support for it to pass. It was delayed until after Christmas, but no specific date was set. This clearly represented a swing back to the executive.

When the opportunity to vote finally came on 15 January 2019, the Withdrawal Agreement was rejected by a majority of 230.[30] The only amendment to the Government motion concerned the UK's unilateral ability to come out of the Northern Ireland backstop as set out in the draft Withdrawal Agreement.[31] That was convincingly defeated with only 24 votes for and 600 against.

The agreement was put to the House for the second time on 12 March 2019. Alongside the Withdrawal Agreement and the Political Declaration, MPs were asked to consider a new Instrument relating to the Withdrawal Agreement, based on the exchange of letters between Theresa May, Donald Tusk and Jean Claude Juncker;[32] a Joint Statement supplementing the Political Declaration;[33] and a unilateral declaration by the UK.[34] Backbenchers (particularly in the Eurosceptic wing of the Conservative Party, the so-called European Research Group (ERG)) had required assurances from the Attorney General (the Government's chief legal advisor and Cabinet member) about the status of the joint statement and the UK's unilateral declaration and whether they granted a right to withdraw from the backstop. His inability to

[28] 'Contempt motion on publishing of legal advice', 4 December 2018 <https://www.parliament.uk/business/news/2018/december/contempt-motion-on-publishing-of-legal-advice/>

[29] HC Deb 4 December 2018, vol 650, col 736, Dominic Grieve

[30] 'Government loses 'meaningful vote' in the Commons', 16 January 2019 <https://www.parliament.uk/business/news/2019/parliamentary-news-2019/meaningful-vote-on-brexit-resumes-in-the-commons/>

[31] HC order paper No. 232 part 115 January 2019, John Baron amendment f, p.9 <https://publications.parliament.uk/pa/cm201719/cmagenda/OP190115.pdf>

[32] <https://ec.europa.eu/commission/publications/letter-president-european-council-and-president-european-commission-prime-minister-theresa-may-14-january-2019_en>

[33] <https://ec.europa.eu/commission/sites/beta-political/files/joint_statement_.pdf>

[34] 'Declaration by Her Majesty's Government of the United Kingdom of Great Britain and Northern Ireland concerning the Northern Ireland Protocol', 11 March 2019 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785124/2019-03-11_Unilateral_Declaration.pdf>

give that legal assurance was a key factor in the second rejection of the Agreement.[35] This time the vote was lost by, a majority of 149.[36]

The third meaningful vote was held on 29 March 2019, the original withdrawal date, with the first Article 50 TEU extension already having been granted. Initially the Speaker of the House of Commons enforced the Parliamentary convention that the same motion should not be put twice, refusing to allow a further vote. To get around this constitutional obstacle, the Government decoupled the draft Withdrawal Agreement from the Political Declaration on the future relationship and presented it again. This was despite section 13(1)(b) of the EU (Withdrawal) Act 2018 which stated that Parliament must approve "the withdrawal agreement and the framework for the future relationship" to effect ratification. Meanwhile, the European Council's extension decision was prudently worded so that only the Withdrawal Agreement would need to be approved to warrant the longer extension.[37] In any case, the agreement was rejected for the third time by 286 to 344.[38] The Prime Minister's statement immediately after the defeat summarised the stalemate: "This House has rejected no deal. It has rejected no Brexit. [In the first round of indicative votes] it rejected all the variations of the deal on the table. And today it has rejected approving the withdrawal agreement alone and continuing a process on the future."[39]

After Theresa May stood down, Conservative Party members elected Boris Johnson as their new leader in July 2019 and consequently he became Prime Minister. His commitment was to leave the EU on 31 October 2019. On 28 August 2019, on the advice of the Prime Minister the Queen ordered Parliament to be prorogued. It was intended to take effect from between 9 and 12 September 2019 and last until the State Opening at the start of the new Parliamentary session on 14 October 2019. Although the Government presented this suspension of Parliament as routine ahead of a new legislative agenda, its disproportionate extent led others

[35] <https://www.gov.uk/government/publications/legal-opinion-on-joint-instrument-and-unilateral-declaration-concerning-the-withdrawal-agreement

[36] 'Government's Brexit deal defeated again in 'meaningful vote'', 12 March 2019 <https://www.parliament.uk/business/news/2019/march/key-brexit-vote-as-meaningful-vote-returns-to-the-commons/>; S Peers 'The second vote against the withdrawal agreement: what next?' (*EU Law Analysis blog*, 12 March 2019) <http://eulawanalysis.blogspot.com/2019/03/the-second-vote-against-withdrawal.html>

[37] European Council Decision taken in agreement with the United Kingdom, extending the period under Article 50(3)TEU, EUCO XT 20006/19, 22 March 2019, Article 1 <https://data.consilium.europa.eu/doc/document/XT-20006-2019-INIT/en/pdf>

[38] 'Commons votes to reject Government's EU Withdrawal Agreement', 29 March 2019 <https://www.parliament.uk/business/news/2019/march/mps-debate-and-vote-on-the-withdrawal-agreement-with-the-european-union/>

[39] HC Deb 29 March 2019, vol 657, cols 771-775

to suspect the real motivation was to limit MPs' ability to scrutinise EU withdrawal plans and to 'run down the clock'. Ultimately Parliament was suspended between 10 September and 24 September, when the UK Supreme Court declared it justiciable and unlawful.[40]

Meanwhile, renewed negotiations on the Irish backstop were reflected in the revised Protocol on Ireland/Northern Ireland and the Political Declaration on 17 October 2019.[41] This paved the way for the EU (Withdrawal Agreement) Bill 2019, needed to give effect to the Withdrawal Agreement in UK law. When it was introduced on 21 October 2019, this time MPs voted for the Agreement in principle (329 to 299) but did not approve the timetable for the Bill (308 to 322). In this way, MPs exerted power by delaying the fourth meaningful vote and consequently required the Prime Minister to request a third extension to the Art 50 period until 31 January 2020.[42]

4. The executive's limitations to Parliamentary power and mechanisms to respond

This section examines three limitations to Parliamentary power – enhanced secondary legislation powers, the prerogative in international relations, and agenda-setting - and the creative use of mechanisms to counteract them in the Brexit context: use of secondary legislation scrutiny committees, (cross-party) private members' bills, indicative votes and amendable motions. In each case I set out the status quo, discuss the relevant Parliamentary mechanism, and indicate its implications in the executive-legislative balance.

[40] *R (on the application of Miller) v Prime Minister; Cherry and others v Advocate General for Scotland* [2019] UKSC 41. For a discussion see e.g. P. Craig, 'Prorogation: Constitutional Principle and Law, Fact and Causation', (UK. Constitutional Law Association blog 2 September. 2019) (available at <https://ukconstitutionallaw.org/>) J. Rowbottom, 'Political Purposes and the Prorogation of Parliament', (*UK Constitutional Law Association blog* 3 September. 2019) (available at <https://ukconstitutionallaw.org/>). The routine prorogation of Parliament then did occur for a shorter period from 8-14 October 2019.

[41] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community OJ 2019/C 66 I/01 and Revised text of the Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom, OJ 2019/C 66 I/02 >

[42] The Withdrawal Agreement Bill was eventually approved on 23 January 2020.

A. Executive prerogative over international relations

In the UK, prerogative powers are customary executive powers held by the Crown since mediaeval times and now exercised by Ministers, which exist outside statute. One significant area of prerogative power is international relations. However, case law draws limits. The prerogative cannot be exercised to take away rights recognised by statute, including rights deriving from EU law, or to undermine the aims of a statute.[43] It would be an abuse of power to use the prerogative to frustrate the will of Parliament or to pre-empt parliamentary decisions.[44] Where statute and existing prerogative powers overlap, prerogative powers are suspended for the duration of the statutory power. [45] The executive's prerogative power was central to when (extensions to the Article 50(3) TEU negotiating period), how (options for the future relationship with the EU, and indeed whether (triggering/revoking Article 50 TEU) Brexit should happen.

The judiciary has played a key role in executive-legislative balance in the context of Brexit, on the limits of prerogative powers, not least regarding prorogation. According the UK Supreme Court, "a decision to prorogue Parliament (or to advise the monarch to prorogue Parliament) will be unlawful if [it] has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive. In such a situation, the court will intervene if the effect is sufficiently serious to justify such an exceptional course." [46]

A number of other issues have been litigated. [47] Among others, first, the *Miller* case established the UK's 'constitutional requirements' for the purposes of triggering Article 50 TEU.[48] Significantly, the Prime Minister could not invoke the Article 50 notification under prerogative, but an Act of Parliament was needed. Secondly, the *Wightman* case, started by a group of Scottish MPs, Members of the Scottish Parliament and Members of the European Parliament, resulted in a preliminary ruling from the Court of Justice affirming that the

[43] *Laker Airways Ltd v Department of Trade* [1977] QB 643
[44] *R v Secretary of State for the Home Department ex parte Fire Brigades Union* [1995] 2 AC 513
[45] *Attorney General v De Keyser's Royal Hotel Ltd* [1920] UKHL 1, [1920] AC 508
[46] *R (on the application of Miller) v Prime Minister; Cherry and others v Advocate General for Scotland* [2019] UKSC 41, para 50
[47] For an overview of relevant cases, see 'Brexit Questions in National and EU Courts' House of Commons Library Briefing Paper 8415, 1 November 2019<https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8415>
[48] *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5

Article 50 notification could be revoked.[49] Thirdly, the domestic legality of the first Article 50 extension was (unsuccessfully) challenged in *English Democrats*.[50] Thes latter two cases also demonstrate how politicians themselves have used judicial channels to further their aims..

Cross-party private members' bills leading to the EU (Withdrawal) Act 2019 challenged the Government's power in international relations. A private members' bill – also known as a backbench bill - is one introduced by an individual MP rather than by the Government.[51] Only 11% of private members' bills become law, compared with 94% of Government bills.[52] This is largely because they have much less time for debate as Government business dominates the timetable.[53] Private members' bills attempted to open up other channels for backbench MPs to influence Brexit strategy, including amendable motions for debate and indicative votes giving them the possibility to air and gauge support for different options. The central theme of these Bills was the curtailment of the Prime Minister's prerogative to choose whether and when to request an extension to the Article 50 TEU negotiating period. These Bills were examples of MPs trying to limit the Prime Minister's ability to 'run down the clock' to the original exit day of 29 March.

The first rejection of the Withdrawal Agreement led to MPs from across three political parties tabling the European Union (Withdrawal) (No. 2[54]) Bill on 16 January.[55] This same cross-party group was responsible for a number of subsequent efforts to introduce legislation to steer Brexit strategy. This provides evidence for Russell's finding that cross-party working is more prevalent than the dominant 'opposition mode' of the House of Commons would suggest.[56] Bill No. 2 would have allowed the Liaison Committee – comprising the Chairs of

[49] C-621/18 *Wightman and Others v Secretary of State for Exiting the European Union* EU:C:2018:851
[50] *R (on the application of the English Democrats) v Prime Minister & Secretary of State for Exiting the EU*, Case No. CO/1322/2019
[51] https://www.parliament.uk/about/how/laws/bills/private-members/
[52] 'Successful Private Members' Bills since 1983', House of Commons Library, 5 July 2017 <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN04568> 'EU Referendum Bill: how many private members' bills pass?' (*The Guardian*, 15 May 2013) <https://www.theguardian.com/news/datablog/2013/may/15/eu-referendum-bill-cameron-data>
[53] Private Members' bills have precedence on thirteen Fridays in each Parliamentary session under Standing Order 14(8): 'Standing Orders of the House of Commons - Public Business 2018' <https://publications.parliament.uk/pa/cm201719/cmstords/1020/body.html#_idTextAnchor076>
[54] 'No. 1' was the Bill which led to the EU (Withdrawal) Act 2018
[55] 'European Union (Withdrawal) (No. 2) Bill 2017-19', House of Commons Library briefing paper 8476, 18 January 2019 <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8476>.
[56] M Russell and P Cowley 'Modes of UK Executive-Legislative Relations Revisited', (2018) 89 (1) *Political Quarterly* 18-28

all Commons Select Committees in particular policy areas – to take the lead on preparation of a plan if the Government had not secured an approval motion after a 'meaningful vote' under section 13(1)(b) of the EU Withdrawal Act 2018 Act by 11 February 2019. Following further cross-party negotiations, revised EU (Withdrawal) (No. 3) Bill was introduced on 21 January 2019.[57] This Bill dropped the statutory role for the Liaison Committee, after the Chair of that Committee doubted it had the resources to perform that task, but required the Prime Minister to ask the European Council for an extension of Article 50 TEU if no deal looked likely. Significantly, if Parliament did not approve the withdrawal agreement before 26 February, the Prime Minister would be required to seek an extension to 31 December 2019, removing the Prime Minister's discretion to choose an extension date. EU (Withdrawal) (No. 4) Bill introduced on 13 February 2019,[58] also aimed at restricting the Prime Minister's discretion about whether and when to seek an extension. The Bill gave the Government until the close of business on 12 March 2019 to secure Commons approval for a deal. The Bill also provided a role for the House of Commons in the event that the European Council proposed a different extension date from the one proposed by the Prime Minister. In the end, Bills 2, 3 and 4 were not granted time for debate in the House of Commons and so were not successful.

On 2 April 2019, after the original withdrawal date of 31 March, the EU Withdrawal (No. 5) Bill, also known as the Cooper/Letwin Bill, was presented.[59] This Bill aimed to extend Article 50, but left the length of the extension to the discretion of the Prime Minister. The purpose of the European Union (Withdrawal) (No. 5) Bill was to avert exit without a deal on 12 April i.e. the deadline of the first extension. All the stages of the Bill took place in one day - 8 April - following a business motion to disapply Standing Order 14, the rule which governs the use of Parliamentary time. Given the obstacles to the success of private members' bills, the quick passage and success of this Bill was highly unusual. While also being aided by amendments to the Bill in the House of Lords to correct drafting problems,[60] the Bill's

[57] 'European Union (Withdrawal) (No. 3) Bill 2017-19', House of Commons Library briefing paper 8480, 23 January 2019 <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8476>
[58] 'European Union (Withdrawal) (No. 4) Bill 2017-19', House of Commons Library briefing paper 8502, 19 February 2019 <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8502>
[59] 'European Union (Withdrawal) (No. 5) Bill 2017-19', House of Commons Library briefing paper 8541, 2 April 2019 <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8541>; G Cowie 'The Cooper Act and Article 50 – a new role for Parliament?' (*House of Commons Library blog*, 9 April 2019) <https://commonslibrary.parliament.uk/brexit/legislation/the-cooper-act-and-article-50-a-new-role-for-parliament/>
[60] See e.g. M Elliott 'The Cooper-Letwin Bill: Parliamentary control over the extension of Article 50', (*Public Law for Everyone*, 4 April 2019) <https://publiclawforeveryone.com/2019/04/04/the-cooper-bill-parliamentary-control-over-the-extension-of-article-50/>

passage reflects the eventual success of backbench MPs in garnering cross-party support. The amended Bill came into law as the EU (Withdrawal) Act 2019.[61]

The predominance of the executive is still present in the EU (Withdrawal) Act 2019. The prerogative of the Prime Minister to choose and agree to an extension of Article 50 was preserved in section 6, provided that the requested extension ended no earlier than 22 May 2019. The Commons could in principle vote to amend that date. In practice, when the Prime Minister chose 30 June, MPs approved her choice by 420 to 110. The Government was also successful in amending the process for changing the definition of 'exit day' in the EU (Withdrawal) Act 2018.[62] The date of 'exit day' could then be changed by secondary legislation through the negative rather than affirmative procedure, with less scrutiny. This did not only apply to the motion to prevent 'no deal' on 12 April, but applied to the subsequent extensions. The Government in place since December 2019 has successfully removed Parliament's ability to scrutinise the future relationship agreement in the EU (Withdrawal Agreement) Act 2020, the domestic legislation which ratifies the Withdrawal Agreement.

B. Agenda-setting and control of Parliamentary business

As already stated, the Government overwhelmingly has control of the Parliamentary timetable. Backbenchers gaining control of the Order Paper, i.e. the House of Commons agenda, is highly unusual. Standing Order 14 of the House of Commons states that government business has precedence at every sitting of a parliamentary session, with specified exceptions.[63] These exceptions include 35 days for Backbench Business Committee debates selected on the basis of bids by individual MPs, 20 days allocated to Opposition parties and 13 Fridays for debates on Private Members' Bills proposed by individual MPs.[64]

Alongside the 'meaningful' vote' process under s. 13 of the EU (Withdrawal) Act 2018 as described in part 3, MPs made various attempts to exert influence on the Brexit agenda

[61] <http://www.legislation.gov.uk/ukpga/2019/16/contents/enacted>
[62] See M Elliott on the lawfulness of the first Article 50 extension: 'Did the UK Government act unlawfully by extending Article 50?' (*Public Law for Everyone blog*, 26 March 2019)<https://publiclawforeveryone.com/2019/03/26/did-the-uk-government-act-unlawfully-by-extending-article-50/>
[63] Standing Order 14 <https://publications.parliament.uk/pa/cm200203/cmstords/17507.htm>
[64] See e.g. A Lilly 'Who Should Control the Parliamentary Timetable?' (Institute for Government, 28 January 2019) <https://www.instituteforgovernment.org.uk/blog/who-should-control-parliamentary-timetable>

through non-binding votes tabled by Government, amendable neutral Government motions, and notably the 'indicative' votes held in March and April 2019.

The role of the Speaker of the House of Commons is significant; as the politically impartial chair of debates in the House of Commons, he chooses which options should be debated. On 10 January 2019, the Speaker controversially allowed a vote on an amendment to a Government programme motion by Dominic Grieve MP, a Conservative backbencher and former Attorney General. A programme motion sets out how much time is set aside for debates. The Government lost by 11 votes, and the effect was to require the Government to table a motion proposing a 'Plan B' within 3 days rather than 21 days if the Withdrawal Agreement was rejected for the second time (as it ultimately was, on 15 January 2019).

Following the first vote against the Withdrawal Agreement, the Prime Minister Theresa May gave a written statement on 21 January 2019 setting out her next steps. This plan included MPs voting on a range of substantive outcomes on 29 January 2019. One of the (unsuccessful) proposals, again by Dominic Grieve MP, was to set aside six full days in the Commons before 26 March to debate alternatives to the Prime Minister's Brexit plan. According to this proposal, MPs would prioritise proposals from 300 MPs covering at least 5 political parties. However, the only two proposals that did enjoy majority support were the Spelman amendment rejecting leaving the EU without a Withdrawal Agreement and framework for the future relationship, and the Brady amendment to seek 'alternative arrangements' for the Northern Ireland backstop. [65] While these outcomes were non-binding, it was on the basis of the Brady amendment that the Prime Minister sought to reopen negotiations with the EU.

With the original exit day of 31 March 2019 fast approaching, backbench MPs working across political parties eventually gained the opportunity to hold their own 'indicative' votes on the way forward. Oliver Letwin MP, one of the instigators of the EU Withdrawal (No. 5) Bill, tabled a motion on 25 March for control of the Order Paper and votes for two days later. MPs were able to accept as many or as few options as they wished. The fact that the options were not ranked in order of preference made it difficult to gauge the relative strength of

[65] 'House of Commons debates Brexit next steps', 29 January 2019 <https://www.parliament.uk/business/news/2019/parliamentary-news-2019/house-of-commons-debates-brexit-next-steps/>

support for each one. However, the aggregate of MPs merely choosing an option indicated that it would in principle be acceptable, and a basis for compromise.

The first round of indicative votes on 27 March offered to MPs eight options. However, none of them ultimately passed. As the European Commission's chief spokesperson put it: "We counted eight noes last night, now we need a yes on the way forward."[66] The options and results were:

- Customs union: 265-271
- Confirmatory vote to ratify agreement - essentially another referendum, but to confirm an agreement previously approved by Parliament : 268-295
- Labour Party official plan, including a "comprehensive customs union" with UK consultation on future trade agreements, alignment with the Single Market, non-regression of EU rights, participation in EU agencies and programmes, and a security agreement: 237-307
- 'Common Market 2.0' - membership of the European Free Trade Association, allowing continued participation in the Single Market and a "comprehensive customs arrangement" with the EU until a fuller trade agreement was negotiated guaranteeing frictionless movement of goods and an open border in Ireland 189-283
- Contingent preferential trade agreements in case a withdrawal agreement is not implemented 139-422
- EEA/EFTA membership without a customs union : 64-377
- Revocation of Article 50 TEU – if Parliament does not approve the Withdrawal Agreement two days before scheduled exit day, Government would need to ask MPs to vote on whether they authorised a no deal Brexit. If they voted against, the Prime Minister would be required to revoke Article 50[67]): 184-293
- Leaving the EU without a deal on 12 April 160-400

Although all eight options were rejected, the two rejected by the smallest majority were a "permanent and comprehensive UK-wide customs union with the EU", which lost by 8 votes,

[66] 'Brexit: Government Plans to Hold New Vote' (*The Guardian*, 28 March 2019) <https://www.bbc.co.uk/news/uk-politics-47729773>

[67] Tabled by Joanna Cherry MP, one of the applicants in the *Wightman* case, in which the CJEU had ruled that revocation was possible: C-621/18 *Wightman and Others v Secretary of State for Exiting the European Union* EU:C:2018:851

and a confirmatory vote, lost by 27 votes. 'No deal' with the EU was the least attractive option to MPs. This was the third time that a 'no deal' outcome was rejected by the House.

In the second round of indicative votes on 1 April, MPs were presented with four alternatives, which overlapped with those in the initial round:

- Customs union : 273-276
- Confirmatory public vote : 280-292
- Common market 2.0 – as above, but with the UK also being consulted on the EU's future trade agreements with third countries until new UK-EU trade arrangements were introduced guaranteeing the Irish border: 261-282
- Revocation of Article 50 – as an alternative, Article 50 should be extended if it is not possible to avoid a no deal outcome; there should be an inquiry to assess a future relationship acceptable to both the UK and EU : 191-292

Again, membership of a customs union was the most popular option, losing by a majority of only 3 after the Scottish National Party abstained. Similarly, the Labour Party instructed its MPs not to support the Article 50 revocation/extension option tabled by Remain-supporting Conservative and Scottish National Party MPs. Despite the cross-party efforts to secure the indicative votes in the first place, clearly party politics still prevailed and ultimately prevented a decisive consensus. After a tied decision, the Speaker's casting vote blocked a third round of indicative votes on 3 April.

These indicative votes were not binding on the Government, and they were indecisive in that none commanded majority support. Nonetheless, they had an influence on the negotiations between the Prime Minister and the Leader of the Opposition. Having failed to win support for the draft Withdrawal Agreement for the third time, Theresa May announced talks with Jeremy Corbyn,[68] focusing on the future relationship with the EU. They announced they would either agree and introduce legislation before the special European Council on 10 April, when a further extension to the Article 50 period was to be considered, or, if unable to reach a position, agree terms to put range of options to MPs, with both parties recognising and giving effect to the results. This would in effect render the votes binding. In the event, talks broke down. Again, party politics proved insurmountable.

[68] <https://www.gov.uk/government/speeches/pm-statement-on-brexit-2-april-2019>

Amendable motions in neutral terms were also a significant channel for MPs to try to influence the agenda. Standing Order 24B of the House of Commons states that if the Speaker considers that a motion is expressed in "neutral terms" (e.g. 'This House has considered the matter of ….') then "no amendments to it may be tabled".[69] However, the Grieve motion on 4 December 2018 under s.13 of the EU (Withdrawal) Act 2018, to instruct the Government on 'Plan B' if the Withdrawal Agreement was not passed, opened the door for Government motions to be amended. MPs then suspended Standing Order 14 on several occasions: to allow for the indicative votes, to debate Bill No. 5, and to enact that Bill as the EU (Withdrawal) Act 2019 in a single day.[70]

Reforms proposed by the Select Committee on Reform of the House of Commons (the Wright Committee)[71] in 2009 recommended establishment of a House Business Committee composed of frontbenchers from the main parties, backbenchers elected by the House, and the Deputy Speaker in the chair. The committee would propose the agenda each week, to be put to the whole House of Commons for decision and possible amendment (in common with the Scottish Parliament). The proposals were approved in principle by the House of Commons before the 2010 general election, but ultimately only the Backbench Business Committee proposal was taken up. It remains to be seen whether the modest progress gained by MPs in setting the agenda will encourage them to put their influence on a more permanent footing. As the Government once again enjoys a majority after the December 2019 General Election, prospects seem weaker.

C. Secondary legislation by Ministers

The EU (Withdrawal) Act 2018 provides for the repeal of the European Communities Act 1972, the conduit by which EU law comes into UK law, including removing the supremacy of EU law under s.2 of the 1972 Act. To avoid gaping holes in the statute book, s. 2(1) of the Withdrawal Act then provides for the retention of EU laws, so that direct EU legislation and 'EU-derived domestic legislation' that is in effect immediately before exit 'continues to have

[69] <https://publications.parliament.uk/pa/cm201516/cmstords/1154/body.htm#24B>
[70] A Young Taking (Back) Control?' (*UK Constitutional Law Association blog*, 23 April 2019) <https://ukconstitutionallaw.org/2019/04/23/alison-young-taking-back-control/>
[71] Reform Committee, *Rebuilding the House* (HC 2008-09, 1117); M Russell, '"Never allow a crisis go to waste": The Wright Committee reforms to strengthen the House of Commons' (2011) 64(4) *Parliamentary Affairs* 612-633

effect in domestic law on and after exit day'. The EU (Withdrawal) Act 2018, section 8, grants wide-ranging powers to Ministers to 'correct deficiencies' in legislation subsumed into UK law, and section 23 allows them to make other consequential amendments. They do this through secondary legislation, known as 'statutory instruments' (SIs). In the UK it is not uncommon for Acts of Parliament (i.e. primary legislation) to delegate powers to the executive to make SIs, but in the case of the EU (Withdrawal) Act 2018 the scope is particularly broad. The definition of 'exit day' itself was also done by SI under s. 20(4) of the Withdrawal Act, to take account of extensions. SIs can be laid by 'affirmative' or 'negative' procedure. A SI that is subject to affirmative procedure requires the formal approval of both Houses of Parliament before it becomes law. A SI under the negative procedure will automatically become law without debate unless there is an objection from either House.

There are existing committees which scrutinise EU affairs. House of Commons Select Committees mirror government departments. Paradoxically, the prospect of withdrawal from the EU increased the salience of EU affairs. All select committees have a role in scrutinising elements of Brexit since it permeates all policies, geographic areas and sectors of the economy – an example of mainstreaming of EU affairs.[72] Some had a central role regarding EU affairs: in the Commons, the European Scrutiny Committee, the Exiting the EU Committee, and the International Trade Committee. The latter two were only formed when the respective departments were created in 2016 after the referendum (and the second disbanded when the Department for Exiting the EU closed on withdrawal day, 31 January 2020). The European Scrutiny Committee[73] had a different role in assessing the significance of around 1100 EU legislative proposals and documents Parliament received each year. It served to streamline scrutiny of EU affairs by sifting these documents to prioritise which should be subject to fuller scrutiny and subsidiarity checks. To that end it prepared weekly reports on EU draft legislation as well as carrying out inquiries on specific topics, for example its report in March 2019 on the conduct of the EU withdrawal negotiations. It was also responsible for producing reasoned opinions under the subsidiarity Early Warning Mechanism under Protocol 2 Article 6 of the Treaty of Lisbon.

[72] K Gattermann, A-L Högenauer and A Huff 'National Parliaments After Lisbon: Towards Mainstreaming of EU Affairs?' (*OPAL online paper series*, 2013) <http://www.opal-europe.org/tmp/Opal%20Online%20Paper/13.pdf>

[73] 'Role – European Scrutiny Committee' <https://www.parliament.uk/business/committees/committees-a-z/commons-select/european-scrutiny-committee/role/>

Ongoing scrutiny procedures will need to be established to continue to monitor EU affairs and legislation beyond the transition period. Before the December 2019 election, there were inquiries in the Exiting the EU Select Committee on the role of Parliament in the progress of the UK's negotiations on EU withdrawal,[74] and in the European Scrutiny Committee on post-Brexit scrutiny of EU law and policy. This latter inquiry included consideration of changes needed to the UK's current system for scrutinising EU law and policy; whether and how EU laws and policies will affect the UK after Brexit; the purpose of continued scrutiny of EU law and policy; action the Government should take to facilitate strong parliamentary scrutiny; and the form scrutiny should take to maximise its effectiveness. [75]

A significant development for executive-legislative relations as a result of the Brexit process is the creation of a new sifting committee in the House of Commons to scrutinise SIs under the EU (Withdrawal) Act 2018: the European Statutory Instruments Committee (ESIC).[76] A number of SIs have been introduced under other Acts of Parliament, and they continue to fall under the existing committee system for secondary legislation, which is subject to a less comprehensive review.

The European Statutory Instruments Committee, together with its equivalent committee in the House of Lords, has 10 days to scrutinise draft legislation proposed for the negative procedure and can recommend that it be upgraded to the affirmative procedure, requiring MPs to debate it. If the Minister rejects the Committee's recommendation s/he must give a written statement in the House. Originally, the Government had planned to provide only an explanatory memorandum accompanying the legislation but "the Committee felt that this fell well short of what Ministers had offered during the passage of the European Union (Withdrawal) Act"[77] and was successful in forcing greater scrutiny of Ministers' powers. The Committee cannot modify proposals, but does hold Ministers to account. As such, linking to

[74] <https://www.parliament.uk/business/committees/committees-a-z/commons-select/exiting-the-european-union-committee/inquiries/parliament-2017/role-of-parliament-uk-eu-negotiations-inquiry-17-19/> including primary and secondary legislation needed, scrutiny in the event of no deal and Parliament's role in the oversight and negotiation mandate of international agreements

[75] <https://www.parliament.uk/business/committees/committees-a-z/commons-select/european-scrutiny-committee/inquiries/parliament-2017/post-brexit-scrutiny-eu-law-policy-17-19/>

[76] Procedure Committee *Scrutiny of delegated legislation under the European Union (Withdrawal) Act 2018* (HC 2017-19, 1395) 'The European Union (Withdrawal) Act 2018: scrutiny of secondary legislation (Schedule 7)', House of Commons library briefing paper 8329, 9 July 2018 <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8329>

[77] House of Commons Procedure Committee, 'Committee welcomes Government undertaking on scrutiny of SIs', 10 October 2018 <https://www.parliament.uk/business/committees/committees-a-z/commons-select/procedure-committee/news-parliament-2017/government-undertaking-scrutiny-statutory-instruments-17-19/>

the themes in the previous section, this process does not amount to a policy-making power, but policy-influencing through raising concerns and requiring the Government justify its choices. A further feature of ESIC is that it engages the public directly in scrutiny by welcoming observations on specific SIs from interested individuals and organisations through its 'Engagement Tool'.[78]

There was no precise figure on the number of SIs needed to effect Brexit (original estimates were 800-1000), an additional obstacle to scrutiny. [79] A week before the second withdrawal extension, the Leader of the House of Commons stated that the programme of Brexit statutory instruments was "almost complete" and that the government expected to lay about 550 in total.[80] As at 8 April 2019 528 SIs had been laid and 475 had completed their passage through Parliament. [81] Controversially, 130 of those amend or repeal Acts of Parliament. The Public Law Project's SIFT project,[82] undertaking a qualitative analysis of SIs, also revealed examples of SIs introducing policy changes even while the relevant primary legislation was still going through Parliament. [83] Of all the SIs, 306 were proposed for the negative procedure and 221 were laid by the Government under the affirmative procedure explained above. As at 8 April, ESIC had considered 226 negative SIs and recommended that 43 of them – a considerable proportion - be upgraded to the affirmative procedure.

Parliamentary conventions govern the number of days for scrutiny. Before each of the extensions to the withdrawal date, the Government did not leave enough time to adhere to these conventions.[84] To deal with pressure on the legislative programme, the Government could decide not to follow these Parliamentary conventions. The "urgent deficiencies" procedure in Schedule 7, Section 5 of the EU (Withdrawal) Act allows Ministers to make SIs

[78] <https://esic-parliament.uk/>
[79] <https://beta.parliament.uk/find-a-statutory-instrument>
[80] The Hansard Society <https://www.hansardsociety.org.uk/blog/westminster-lens-brexit-statutory-instruments-dashboard#how-many-brexit-sis-has-the-government-laid-before-parliament-so-far>
[81] According to the Hansard Society's Brexit statutory instruments analysis <https://www.hansardsociety.org.uk/blog/westminster-lens-brexit-statutory-instruments-dashboard#how-many-brexit-sis-has-the-government-laid-before-parliament-so-far>
[82] https://publiclawproject.org.uk/what-we-do/current-projects-and-activities/brexit/the-sift-project/. The Public Law Project is a charity with a research programme aiming to improve access to justice.
[83] A Sinclair and J Tomlinson 'Brexit, Primary Legislation, and Statutory Instruments: Everything in Its Right Place?' (*UK Constitutional Law Association blog*, 25 March 2019) <https://ukconstitutionallaw.org/2019/03/25/alexandra-sinclair-and-joe-tomlinson-brexit-primary-legislation-and-statutory-instruments-everything-in-its-right-place/>
[84] R Fox 'Can the government get all its Brexit Statutory Instruments through Parliament by exit day on 29 March?' (*Hansard Society*, 12 February 2019) <https://www.hansardsociety.org.uk/blog/can-the-government-get-all-its-brexit-statutory-instruments-through>

with immediate effect. Both Houses would then have to approve the made affirmative SIs within 28 days for them to remain in force.

In summary, the enhanced scrutiny procedures for SIs laid under the EU Withdrawal Act 2018 has strengthened Parliament. The procedures create incentives for politically and legally significant SIs to be debated through committee recommendations. They hold Ministers to account while still allowing them the option to reject Parliament's opinion - transparently - if they justify themselves. However, these scrutiny powers do not extend to secondary legislation under other statutes. This is the case even though those statutes also make provision for EU withdrawal consequences or deal with previously EU competences e.g. the Taxation (Cross-Border Trade) Act 2018, the Environment Principles and Governance Bill, and the Immigration and Social Security Coordination (EU Withdrawal) Bill. As indicated by the ESIC inquiry, there are still a number of issues to be settled around the design of scrutiny processes and ongoing monitoring of EU legislation beyond the transition period. During transition the ESC can continue to report on the impact of new EU legislation and raise issues of 'vital national interest' for debate.[85]

5. Conclusions

This chapter has assessed the success of MPs in their scrutiny of the UK Government's Brexit strategy during the year in the House of Commons from the introduction of the draft Withdrawal Agreement in December 2018 to Parliament's dissolution in November 2019. The 'meaningful vote' provisions secured in s.13 of the EU (Withdrawal) Act 2018 were central to attempts to assert Parliamentary control. The House of Commons rejected the negotiated Withdrawal Agreement and Political Declaration on the Future Relationship three times – but this remained an example of passive legislative power. Collectively, MPs were not able to propose an alternative solution successfully. In addition to the unprecedented unlawful prorogation of Parliament, the chapter focused on three specific limitations to Parliamentary sovereignty: executive prerogative power concerning whether, when and how EU withdrawal should happen; control of the Parliamentary agenda; and the extension of Ministers' authority to make secondary legislation. It then considered MPs' use of Parliamentary mechanisms in response to these limitations to carve out a more active

[85] s. 29 EU (Withdrawal Agreement) Act 2020

legislative role. In the typology of Parliamentary powers, private members' bills, and to an extent, amendments to Government motions, represent opportunities for making policy. Indicative votes and scrutiny of secondary legislation are not able to substitute the Government's policy, but can influence and reframe its direction.

Given the low success rate of private members' bills, the passage of the Bill that became the European Union (Withdrawal) Act 2019,[86] was an impressive feat. It appears to set a precedent[87] for the ability of cross-party backbenchers to take control of debating time and to initiate and enact legislation. However, the Act only deals with one issue relating to a narrow timeframe – avoiding no deal on 12 April 2019 - which was quickly superseded by events. The Act also preserved the Prime Minister's prerogative to choose the date of the Article 50 TEU extension.

As Government business takes priority in the House of Commons timetable, MPs' use of indicative votes and amendments to motions to wrest control of the agenda, at least briefly, as well as requiring extensions to the negotiation period, also denote achievements. However, there are caveats. First, procedures themselves have not formally changed – Standing Orders were only suspended[88] (and on previous occasions a majority of MPs voted not to suspend them). Secondly, while MPs mobilised procedures, they were not able to capitalise on that success in terms of substantive outcomes for Brexit. For example, in the indicative votes of 27 March and 1 April 2019 which were supposed to test where a Commons majority lay, none of the twelve motions in total commanded sufficient support. A majority in the Commons rejected a 'no deal' scenario on no less than three occasions,[89] but still struggled to coalesce around a positive way of preventing that from happening, partly due to the myriad options, and partly due to party politics. Nonetheless, Parliament was able to require the

[86] <http://www.legislation.gov.uk/ukpga/2019/16/contents/enacted/data.htm>

[87] During the passage of the Bill in the House of Lords there was considerable discussion about whether a precedent was in fact being set. For example, Lord Goldsmith: "this is not a precedent, because the circumstances are exceptional". Lord Judge: "…this, whether precedent or not—and it was—is a one-off and goes no further" HL Deb 8 April 2019 vol 797, cols 398, 407-408

[88] Setting aside Standing Order 24B to enable motions on neutral terms to be amendable, and Standing Order 14 to hold indicative votes, to debate EU (Withdrawal (No. 5) Bill, and to enact the Bill as the EU (Withdrawal) Act 2019.

[89] Spelman amendment on 29 January 2019: HC Deb 29 January 2019, vol 653, cols 775-778 ; on 13 March 2019https://www.parliament.uk/business/news/2019/march/house-of-commons-to-vote-on-no-deal-brexit/ , and on 27 March 2019 (against the Baron option in first round of indicative votes): HC Deb 27 March 2019, vol 657, cols 481-485. The Prime Minister herself finally ruled out no deal (in a change from the "no deal is better than a bad deal" mantra) on 6 April 2019.

Government to seek a ring-fenced agreement on citizens' rights even in a no deal situation (the Costa amendment).[90]

The 2019 Act and the securing of indicative votes do represent a success for cross-party alliances. As Russell shows, cross-party working was already more prevalent than traditionally assumed, so perhaps only became more visible in the Brexit context. There were calls for a national unity government, as happened before in the UK during a time of crisis.[91] This would have been the clearest expression of cross-party working, but it met with resistance due to the entrenched 'opposition mode' of the House of Commons and was never seriously pursued.

The Commons European Statutory Instruments Committee has increased democratic legitimacy by holding Ministers to account for their choices in secondary legislation. In particular, it can recommend that instruments laid under the 'negative' scrutiny procedure instead be subject to debate under the 'affirmative' procedure. If the Minister rejects the recommendation, an explanation must be given to the House. Affirmative instruments are then subject to approval by both Houses. While significant, these enhanced scrutiny processes only apply to secondary legislation laid pursuant to the EU (Withdrawal) Act 2018 itself, and not to secondary legislation laid under other Acts of Parliament.

In terms of drivers for change in the executive-legislative balance, the June 2016 referendum leading to the UK's withdrawal negotiations challenged the representative democracy of Parliament itself with direct democracy. Later, there was popular mobilisation in the form of the People's Vote March on 23 March 2019, attended by over a million people, and a petition to revoke the Article 50 notification, with over 6 million signatories. The Government rejected it, but as with any petition with over 100,000 signatures, MPs were required to debate it.[92]

Meanwhile, two factors which normally assure the Government's dominance were absent in the Brexit House of Commons – no Government majority, and lack of party-political discipline. Brexit fractured both major political parties – the Conservatives and Labour – and

[90] 'Further debate on Brexit next steps ahead of March votes', House of Commons, 27 February 2019 <https://www.parliament.uk/business/news/2019/february/further-debate-on-brexit-next-steps-ahead-of-march-votes/>; Correspondence between the UK and the EU: <https://www.gov.uk/government/publications/costa-amendment-letter-to-the-eu-institutions>

[91] 1931-1940 during the Great Depression

[92] <https://petition.parliament.uk/petitions/241584>

Labour as the formal opposition did not take advantage of the lack of Government majority. The Independent Group of MPs, initially not a political party but then established as Change UK, was formed from disaffected members of both parties. Rejection of their former parties' approaches to Brexit was one (although not the only) trigger for this, with support for a second referendum, including Remain as an option, being the unifying characteristic of the breakaway MPs. However, their initial promise did not materialise when they failed to win a single seat in the European Parliament elections in May 2019. Party politics reasserted itself following the December 2019 UK election.

The UK and EU judiciaries played a key role in defining the executive-legislative balance in the context of Brexit, particularly on the limits of prerogative powers. This was most obvious when the UK Supreme Court declared the September 2019 prorogation of Parliament to be unlawful. Earlier cases established the UK's 'constitutional requirements' for the purposes of triggering Article 50 TEU; confirmed that the Article 50 notification could be revoked; and raised the legality of the UK's agreement to the Article 50 extension. The applicants in some of these cases were politicians (in *Wightman* on Article 50 revocation and in *English Democrats* on the legality of the extension), using different channels to further their aims.

Events in the Brexit House of Commons have brought into relief the traditional doctrine of Parliamentary sovereignty and different understandings of Government in Parliament. To return to the overall question addressed by this volume regarding the evolution of the executive-legislative balance since the Lisbon Treaty, the extraordinary circumstances make it difficult to assess the extent to which any change might be a lasting one. Events since the UK General Election suggest the executive once again has the upper hand, and factors favouring the Commons' power were short-lived. In the EU (Withdrawal Agreement) Act 2020 the Government successfully removed the requirement for Parliamentary scrutiny of an agreement on the UK-EU future relationship. In the post-withdrawal context, the executive will be the gatekeeper in deciding what happens to competences returned from the EU level – retaining, removing, or continuing to coordinate in some way with the EU and its EU Member States. Technocratic agencies are likely to have a greater role in assessing regulatory equivalence in any future relationship. This invites consideration of the prospects for reparliamentarisation. The UK Parliament will need new processes for monitoring new EU legislation, for scrutiny of the UK-EU future relationship, and a new framework for interparliamentary relations beyond the Treaty of Lisbon system. The fundamental question is

whether competences transferred (back) to the national level will indeed lead to Parliament taking back control.